

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, DC. 20554

In The Matter of)

AUG 14 1998

Implementation of Section 11(c)
 of the Cable Television Consumer Protection
 and Competition Act of 1992)

MM Docket No. 92-264

Horizontal Ownership Limits)

**COMMENTS OF
 RCN TELECOM SERVICES, INC.**

RCN Telecom Services, Inc. ("RCN"), by the undersigned counsel, herewith respectfully submits its Comments in response to the Federal Communications Commission's ("Commission") Further Notice of Proposed Rulemaking in the above-captioned matter.¹ As set forth below, RCN, the most active proponent of open video systems, urges the Commission to foster competition in the multichannel video programing distribution market by reducing the horizontal ownership limit from 30% to 20% and by imposing additional limits on incumbent cable operators' clustering of franchise areas.

¹ *In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits, Second Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking, MM Docket No. 92-264, FCC 98-138, rel. June 26, 1998 ("Second Order on Reconsideration" or "Further Notice").*

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I. INTRODUCTION

At the time Congress enacted the Telecommunications Act of 1996 (the "1996 Act"),² many of the large incumbent telecommunications services providers promised their rapid expansion into new telecommunications markets. However, few have made significant headway to date; in particular, incumbent local exchange carriers ("ILECs") largely have abandoned their efforts to offer competitive video programming. RCN, on the other hand, which does not even enjoy an incumbent monopoly position in one market from which to launch a competitive service in other industry segments, has made significant strides towards making the pro-competitive goals of the 1996 Act a reality. RCN, alone and through various affiliations, is a facilities-based competitive provider of local exchange and long distance telephone services, high-speed Internet access, and traditional franchised cable and/or OVS services, primarily to residential subscribers. In video markets, RCN is the largest investor in and implementor of the open video system ("OVS") concept.³ Alone or together with various affiliates, RCN is currently certified to provide OVS services in the metropolitan areas of Boston, MA,⁴ New York City,⁵ Washington,

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

³ 47 U.S.C. §§ 573-575.

⁴ *Memorandum Opinion & Order, RCN-BeCoCom-BETG, LLC, Certification to Operate an Open Video System*, 12 FCC Rcd 2480 (1997). RCN-BeCoCom, LLC is an enterprise which is 51% owned by RCN Corporation and 49% by BeCoCom, an unregulated subsidiary of the Boston Edison Company.

⁵ *Memorandum Opinion & Order, Residential Communications Network of New York, Inc. Certification to Operate an Open Video System*, 12 FCC Rcd 2477 (1997).

D.C.,⁶ San Francisco, CA,⁷ Philadelphia, PA,⁸ and northern New Jersey.⁹ RCN currently offers OVS service in portions of New York City and Boston, and will offer OVS services in several additional communities in the next few months.

In the *Second Order on Reconsideration*, the Commission, *inter alia*, denied petitions for reconsideration of its earlier determination that no cable system (plus affiliates) may reach more than 30% of all homes passed nationwide.¹⁰ The Commission in the Further Notice, however, notes that the 30% horizontal ownership limit was adopted in 1993 and thus seeks comment on whether 30% remains appropriate in light of evolving market conditions since 1993, including the continued and anticipated growth of alternative multichannel video programming distributors ("MVPDs"). The Commission seeks comment on two proposed alterations to the existing rule: (1) whether the "homes passed" measure as used in the rule should include all homes passed by all MVPDs, and not just those passed by traditional cable systems; and (2) whether the rule prescribing a horizontal penetration limit should be based on actual subscribers rather than on

⁶ *Memorandum Opinion & Order, Starpower Communications, LLC, Certification to Operate an Open Video System*, 13 FCC Rcd 2169 (1998). Starpower is an enterprise jointly owned by RCN and an unregulated subsidiary of the Potomac Electric Power Company.

⁷ *Memorandum Opinion & Order, RCN Telecom Services of California, Inc., Certification to Operate an Open Video System*, DA 98-1158, rel. June 15, 1998.

⁸ *Memorandum Opinion & Order, RCN Telecom Services of Philadelphia, Inc., Certification to Operate an Open Video System*, DA 98-1155, rel. June 15, 1998.

⁹ *Memorandum Opinion & Order, RCN Telecom Services of New Jersey, Inc., Certification to Operate an Open Video System*, DA 98-1530 (July 31, 1998).

¹⁰ Second Order on Reconsideration at ¶ 3 citing *In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits*, Second Report and Order. MM Docket No. 92-264, 8 FCC Rcd 8565 (1993) ("Second Report and Order"); 47 C.F.R. § 76.503.

homes passed.¹¹ The Commission also seeks comment on whether the method for calculating horizontal ownership should be modified to support cable overbuild competition.¹²

These comments are offered from the perspective of an emerging entrant into video markets which faces pervasive and increasingly intense anticompetitive obstacles raised by the entrenched cable industry. The Commission is well aware that, notwithstanding the introduction of various forms of MVPD competition in the last few years, incumbent cable operators remain overwhelmingly dominant in the video marketplace and are likely to retain that dominance for the foreseeable future.¹³ RCN thus believes that the Commission must take a more active role in facilitating competition in video markets, and particularly OVS operators' entry, if Congress's vision for competition to the incumbent cable monopoly operators is to be fulfilled.

One important way to foster such competition would be the Commission's reduction of the horizontal ownership limit for incumbent cable operators from 30% to 20%. RCN also recommends that regulations be adopted to restrain the dominance of cable operators within clusters of franchise areas. Finally, under no circumstances should the Commission alter its rules in a manner that would permit the further concentration of market dominance in the hands of a relatively few cable companies. Rather, RCN urges the Commission to modify its present method of calculating ownership percentages to more accurately reflect the cable industry's

¹¹ *Further Notice* at ¶¶ 4, 78-88.

¹² *Id.*, at ¶ 79.

¹³ *Fourth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 97-423, CS Docket No. 97-141, *rel.* January 13, 1998, at ¶¶ 126, 128 and 150.

dominance of the MVPD market. The cable industry's continued overwhelming dominance of the video distribution programming supply markets demonstrates that the conditions do not yet exist to support amending the Commission's ownership rule to reflect the presence of alternative MVPDs in the base of the ownership measure, although the increased influence of cable operators caused by their investment in alternative MVPDs justifies reflecting alternative MVPDs in the numerator of the equation. Similarly, basing the ownership calculation on subscribers served, rather than on the number of homes passed by cable operators, would not fully account for the market influence of cable operators.

II. BACKGROUND

Together with its corporate parent, RCN Corporation, RCN's capital budget in 1998 and 1999 for all of its telecommunications activities will be approximately \$850 million. RCN has approximately 658,000 subscriber connections delivered through a variety of owned and leased facilities.¹⁴ RCN's business plan emphasizes the residential market and is structured to offer consumers a combination of local exchange and long distance telephone service, high-speed Internet access, and traditional cable or OVS services in one bundled offering. Generally, RCN offers these services, both in a package or individually, at rates lower than RCN's competitors.¹⁵

¹⁴ A "connection" for this purpose is a unit of service, such as a local telephone line, Internet customer, or a video services customer. As of March 31, 1998, RCN had approximately 15,600 subscribers to its OVS service, approximately 40,860 connections attributable to its wireless video systems and approximately 187,000 connections attributable to its traditional cable systems.

¹⁵ For example, RCN's competitive local exchange service is generally priced 5% less than the incumbent local exchange carrier's.

With respect to video programming, RCN currently offers OVS services in portions of Manhattan and Boston, and will do so in two Boston suburbs (Arlington and Newton) in a few months.¹⁶ RCN deploys fiber optic cable except in special situations in Manhattan where RCN delivers its video services by microwave on an interim basis until fiber optic cable can be deployed there. The systems are designed for analog transmission although the company plans to migrate to digital as soon as the economics of doing so become more attractive. RCN offers a full line-up of up to 110 channels of high quality basic, premium and pay-per-view video programming.¹⁷ As demonstrated in the representative rate comparisons contained in an exhibit hereto, RCN's video offerings are superior to, and less than expensive than those of the incumbents.

RCN's OVS certification for the Boston area encompasses the City of Boston and more than 40 surrounding communities.¹⁸ RCN currently provides service to some 8,500 subscribers in the City of Boston. While some of these subscribers take only OVS service, most take the three-way combination of voice, video and data. RCN's major competitors in the Boston area market are Time Warner Cable Co., which serves approximately 270,000 subscribers,¹⁹

¹⁶ RCN expects to sign an OVS agreement with the town of Waltham, MA in the coming weeks.

¹⁷ RCN also offers the latest "impulse" technology which allows convenient impulse pay-per-view ordering of movies and special events using a customer's remote control.

¹⁸ Subsequently, to fulfill the preferences of local regulators, RCN secured traditional cable franchise agreements in a number of these communities, including Somerville and Framingham, and expects to negotiate franchises in additional municipalities.

¹⁹ See www.pathfinder.com/corp/fhook/fbcable.html.

Cablevision Systems Corp., with approximately 345,000,²⁰ and MediaOne, Inc., with approximately 199,000 subscribers.²¹ Combined, these incumbents serve the large majority of the households in RCN's service area.

In New York City, RCN provides video programming service to over 40,000 subscribers located primarily in Manhattan and recently agreed with municipal regulators to expand its services into the other boroughs. At present, RCN delivers its offerings largely over microwave facilities acquired from a predecessor in interest, but is actively installing fiber optic distribution facilities. RCN's competitors in New York include Time Warner in Manhattan and Cablevision in other boroughs and in numerous New York City suburbs.

In both of these markets RCN has encountered anticompetitive tactics by the incumbent cable operators designed to thwart RCN's efforts to provide a competitive service or to make doing so unnecessarily expensive or time-consuming. RCN also has experienced an orchestrated campaign by two of the incumbent franchisees in the Boston market that has included almost every conceivable legal and regulatory device to block its path. RCN does not expect entrenched monopolists to welcome competition; this would be contrary to all experience and is simply unrealistic.²² On the other hand, the questions posed in the Further Notice compel RCN to make

²⁰ See www.cablevision.com/cvhome/cvabout/finance.html.

²¹ Source: Commonwealth of Massachusetts, Department of Public Utilities, Cable Television Division, Cable System List Database.

²² See *Predation In Local Cable TV Markets*, Antitrust Bulletin, 9/1/95 by T.W. Hazlett: "Cable television operators pursue a predictable set of reactions... to a potential CATV entrant... beginning with a vigorous lobbying campaign to deny entry rights... selective price cutting, preemptively remarketing the first submarkets to be competitively wired... tying up cable network programming... delaying access to ... poles and/or underground conduits... and creating

the Commission aware of the anticompetitive campaign to which RCN has been subjected by the incumbent cable industry.²³

The Commission does not need to be persuaded that competition in the video marketplace is both desirable and necessary. The continuous increase in customers' cable rates, typically well in excess of inflation, is a constant topic of concern.²⁴ The Commission should be aware, however, that RCN's entrance into certain markets has caused cable operators to exercise dramatic restraint in certain instances. For example, in late 1997, Time Warner announced that new rate increases in the range of 10% to 15% would take effect throughout the Boston area,²⁵ except in Somerville, where RCN provides the first competitive cable service in Massachusetts and one of the first such services in the country.²⁶ Similarly, in the City of Boston, Cablevision

customer confusion...." *Id.* at 11.

²³ In its recently filed comments in the Commission's annual assessment of the status of competition in video markets, RCN described at length the multitudinous and seemingly unending pleadings filed by cable operators seeking to impede RCN's progress. See Comments of RCN Telecom Services, Inc., Docket No. 98-102, filed July 31, 1998.

²⁴ See, e.g., Communications Daily, July 15, 1998, p. 2, reporting recently released CPI data showing cable rate increases of 7.3% over the previous 12 months as compared with a 1.7% inflation rate. Cablevision's own Internet homepage show an increase in the recurring average monthly revenue per subscriber from \$38.53 in December 1997 to \$41.65 in March 1998, or an increase of more than 8% (<http://www.cablevision.com/cvhome/cvabout/finance.htm>). See also Letter from the Utility Consumers' Action Network to the Honorable Senator John McCain, July 23, 1998, reporting cable rates increases from 1996 to 1998 for: Cox (65% for basic); Southeastern (21% for expanded basic); and Daniels (25% for expanded basic).

²⁵ *Boston Globe*, December 21, 1997 (WL 6286769).

²⁶ *Boston Globe*, November 26, 1997 (WL 6282146). In fact, a cable company executive stated that the company is "looking at a whole new competitive pricing system" and "facing how we deal in a competitive environment for the first time." See also *En Banc* Presentation on the Status of Competition in the Multichannel Video Industry, December 18, 1997, at pp.24-30. In Somerville, as in a few other municipalities, RCN offers video programming as a traditional

raised its rates only 2.5%. In New York City, Time Warner has implemented an aggressive bulk discount program in many of the multiple dwelling unit buildings ("MDUs") where RCN offers competitive video programming.

Recently, Cablevision acquired 845,000 subscribers from Tele-Communications, Inc. ("TCI") in the New York area.²⁷ As a direct competitor of Cablevision in New York, RCN is alarmed at this latest development. Cablevision is the sixth largest cable operator in the United States with approximately 3.37 million subscribers.²⁸ Prior to the Cablevision/TCI acquisition, Cablevision had approximately 440,000 subscribers in the Bronx and Brooklyn and 50,000 in Yonkers. Cablevision serves about 200,000 subscribers in Connecticut and has entered into arrangements to acquire an additional 250,000 Connecticut subscribers from TCI,²⁹ bringing Cablevision's subscribership in the New York-Connecticut area to more than 2.6 million cable customers, or the largest cable cluster in the nation.³⁰ Cablevision also owns one of the largest program suppliers in the nation, Rainbow Programming, L.P., and a controlling interest in

franchised cable operator to fulfill the preferences of local regulators.

²⁷ In exchange for its New York area subscribers and some additional subscribers elsewhere, TCI acquired a 36% equity interest in Cablevision.

²⁸ 1997 Competition Report at ¶ 197 and Table E-3. The Commission's data fail to reflect Cablevision's recent acquisition of additional subscribers from TCI in the New York area and elsewhere. The 3.37 million figure is taken from Cablevision's Internet homepage, where Cablevision itself reports the acquisition of 829,000 TCI subscribers.

²⁹ Cablevision Press Release dated January 27, 1998. To RCN's knowledge, this proposed acquisition has not yet been submitted to the Connecticut Department of Public Utility Control for approval.

³⁰ The same figure is quoted in Cablevision's description of the acquisition on its Internet homepage; *see also* 1997 Competition Report at ¶ 85.

Madison Square Garden, L.P. ("MSG"), which includes the arena complex, two professional New York sports teams, and Radio City Productions.³¹ and the MSG channel, which reaches some 5 million subscribers.³² As a vertically integrated entity from top to bottom,³³ Cablevision by any measure is a major factor in the New York area MVPD marketplace and has the ability to significantly impede competition in that market.

Nevertheless, the Federal Trade Commission ("FTC") decided to permit the Cablevision/TCI acquisition.³⁴ In fact, the FTC concluded that the proposed acquisition would be anticompetitive without the parties' agreement to minor cable divestitures.³⁵ The FTC's decision concerning the Cablevision/TCI acquisition observes that the FTC does not consider multichannel video programming technologies other than cable television, *e.g.*, direct broadcast satellite and wireless cable, to be part of the relevant market for antitrust analysis because "they do not have a significant price-constraining effect on the prices charged by cable operators to

³¹ See Cablevision News Release of Dec. 3, 1997. Rainbow Media Holdings, Inc. and Fox/Liberty Networks have formed a national sports programming venture which will reach 55 million homes. Cablevision News Release dated June 23, 1997.

³² New York Times News Service, Friday, March 20, 1998 (WL-NYT 9807901206).

³³ Cablevision thus owns the arena (Madison Square Garden), the program content (the Knicks and Rangers), program services (MSG and Sports Channel Networks) and the cable systems transmitting the content. See 1997 Competition Report at ¶ 93.

³⁴ *In the Matter of Cablevision Systems Corporation*, File No. 971-0095, 63 FR 5545 (1998) ("FTC Notice")

³⁵ *Id.*

subscribers."³⁶ Thus, the FTC deemed irrelevant the interactions among Cablevision and other MVPDs in the New York City area market. Indeed, OVS is not even mentioned.

III. COMMENTS

In light of the present state of the MVPD industry -- approximately 6% dominance by the incumbent cable industry -- the Commission must give careful thought to remedial regulatory measures.³⁷ Section 613(f)(1)(A) of the Communications Act grants the Commission broad authority to establish limits on the number of cable subscribers any one cable operator can reach.³⁸ Among the public interest factors that Congress directed the Commission to consider, RCN urges the Commission to give substantial weight to its mandate to "take account of the market structure and ownership patterns of the cable industry."³⁹ RCN's experience is that incumbent cable operators do not hesitate to stall competition at its inception, but later, once competition is inevitable, will respond by lowering rates to reasonable levels (typically for the first time) in those particular franchise areas where a competitor has entered, but not in the bordering franchise areas where competition is not yet present. Specifically, in RCN's 18 months of experience in actively deploying OVS services, it has learned that cable giants including Time Warner and Cablevision are all too ready to use their overwhelming resources

³⁶ *Id.*

³⁷ *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fourth Annual Report, CS Docket No. 97-141, 13 FCC Rcd 1034 (1998) ("Fourth Annual Competition Report") at Appendix E.

³⁸ 47 U.S.C. § 533(f)(1)(A).

³⁹ *Id.*, § 533(f)(2)(C).

and market dominance to thwart competitive entry, but later will establish rate discounts and other marketing programs designed to combat the effects of RCN's entry.

RCN recognizes that large scale enterprises can produce economies of scale that incumbent cable operators often claim are essential to providing modern technology and improved services to their viewership.⁴⁰ RCN believes, however, that serious flaws exist in this much-repeated mantra. First, no objective, verifiable or even convincing evidence exists that the scale of operations anticipated by TCI, for example, is essential to procure and deploy modern physical plant. An entity as modest in size as RCN is in the process of installing hundreds of miles of state-of-the-art fiber optic plant without charging excessively high customer rates⁴¹ and without concentrations of millions or even hundreds of thousands of subscribers. Second, as RCN has experienced, instead of fostering innovation and improved services, large scale operations only increase incentives for cable incumbents to protect their monopolies by raising entry hurdles so high that new entrants are intimidated.⁴² The cable incumbents in RCN's existing and future service areas have subjected RCN to unending challenges, which, although

⁴⁰ See, e.g., Testimony of Leo J. Hindery, President of TCI, before the Senate Committee on Commerce, Science and Transportation, July 28, 1998 at 4-5; TCI Opposition to Petitions for Reconsideration of the Second Report and Order at 2-3.

⁴¹ See tables comparing rates charged by RCN and incumbent cable operators in the Boston area, attached hereto as an exhibit.

⁴² Naturally, RCN does not allude here to competitive price reductions or service improvements which, so long as they are not predatory, constitute fair competition and serve the public interest.

they have not yet driven RCN from its goal of offering consumers a competitive choice, may be stalling initiatives by others.⁴³

Third, as described at length in parties' comments in the Commission's video competition proceeding, cable rates continue to rise at an unreasonable pace.⁴⁴ Fourth, cable's competitors, including DBS, MMDS, SMATV and OVS, individually and collectively pose little threat to the cable industry's market dominance for the foreseeable future.⁴⁵ Thus, the MVPD market remains overwhelmingly dominated by cable incumbents and must be constrained if the public interest in the benefits of competition is to be served.

A. The Commission Should Reduce the Percentage of the MVPD Market Which Any One Cable Operator May Reach from 30% to 20%

The Further Notice seeks comments on the continued appropriateness of the 30% ownership limit given the evolving market since the Commission adopted that limit five years ago.⁴⁶ RCN agrees that the limit is ripe for reexamination and urges the Commission to reduce the limit to constrain cable operators' incentives and ability to impede competition. When incumbent cable operators such as Time Warner and Cablevision are willing and able to devote substantial financial, legal and other resources to impeding competitive entry, rather than to improving their services, it is apparent that these entities are too insulated from the mechanisms

⁴³ See note 22, *supra*.

⁴⁴ See, e.g., Ameritech Comments in CS Docket No. 98-102 at 6-9; RCN Comments in CS Docket No. 98-102 at 7.

⁴⁵ See, e.g., NCTA Comments in Docket No. 98-102, filed July 31, 1998 at 6 (showing that all of the cable industry's competitors collectively serve only 15% of MVPD subscribers).

⁴⁶ Further Notice at ¶ 78.

inherent in a competitive market. RCN believes that regulation must be more closely focused on constraining cable operators' dominance of the video programming delivery marketplace. RCN thus urges the Commission to reduce the horizontal ownership limit on any one cable operator's reach from 30% to 20% of the market.

As noted in the *Second Order on Reconsideration*, courts generally have found that a firm cannot successfully obtain a monopoly with less than a 30% market share.⁴⁷ Moreover, given the inevitable rate increases to be implemented by cable operators once cable rate regulation is terminated in seven months,⁴⁸ a significant reduction in a cable operator's permissible market dominance is even more justified.

RCN recognizes that a reduction in the ownership limit to 20% is likely to require divestitures.⁴⁹ In the *Second Order on Reconsideration*, the Commission noted that it previously found the original 30% limit "appropriate because it would 'prevent the nation's largest MSOs from gaining enhanced leverage from increased horizontal concentration' while 'ensur[ing] that the majority of MSOs continue to expand and benefit' from the positive aspects of increased concentration."⁵⁰ However, notwithstanding the Commission's good intentions, the 30% limit has succeeded only with respect to the latter half of this prediction. That is, the cable industry's overwhelming dominance of the video programming market as well as the rapid pace of their rate

⁴⁷ Second Order on Reconsideration at ¶ 42 n.100.

⁴⁸ 47 U.S.C. § 543(c)(4).

⁴⁹ The Commission notes that divestiture as a remedy for excessive cable dominance is well within its statutory authority. Further Notice at ¶¶ 17 and 24.

⁵⁰ Second Order on Reconsideration at ¶ 27 citing Second Report and Order at ¶ 25.

increases show that the 30% limit has not prevented cable operators from enhancing their leverage. On the other hand, the majority of cable MSOs surely have expanded and benefitted from increased concentration.⁵¹

While cable operators can be expected to argue that reducing their current or potential dominance will decrease their innovation and ability to serve, no credible evidence exists to support this proposition. What is credible is that if new entrants like RCN were not battling with vertically- and horizontally-integrated giants like Time Warner and Cablevision, but instead with more modestly sized companies, new entrants would be able to devote their resources to innovation and infrastructure rather than running the cable industry's endless gauntlet of anticompetitive campaigns.

B. Any Alteration of the Ownership Measure Should Depend on the Effects Such a Change Would Have on Video Markets

The Further Notice seeks comment on whether the horizontal ownership rules should be amended to reflect the market presence of all MVPDs rather than only cable operators, stating that doing so may increase the measurement's accuracy.⁵² The Commission proposes to include alternative MVPDs in both the numerator (the cable operator's reach) and the denominator (the cable industry's reach) of the ownership measure. With respect to the denominator, the Commission states, for example, that the growth of alternative MVPDs gives video programmers

⁵¹ As noted by Ameritech New Media Inc. in its initial comments in Docket No. 98-102 (*Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*), in 1985 29% of all cable households were served by the five largest MSOs but by 1997 this figure had risen to 67%. Comments, July 31, 1998, p.4.

⁵² Further Notice at ¶ 79.

additional outlets and thereby decreases cable incumbents' market power in the purchase and distribution of programming. Conversely, the Commission notes that cable operators can increase their dominance by acquiring interests in alternative MVPDs, such as DBS providers.

RCN agrees only in part with the Commission's analysis, however, because despite growth in non-cable MVPD services, no evidence exists to show that cable incumbents' power in the purchase and distribution of video programming has lessened over the last five years. In fact, the Commission only one week ago adopted regulations that increase the potential sanctions to which a cable operator can be subjected for violating the Commission's rules governing competitors' access to programming in which cable operators have an interest.⁵³ Specifically, the Commission held that, in addition to forfeitures, cable operators may be liable for damages in certain instances of unlawful conduct.⁵⁴ The Commission also imposed time limits on its resolution of program access complaints.⁵⁵ Certainly the Commission would not have felt it necessary to take these actions if the growth of alternative MVPDs has truly led to a reduction in cable incumbents' market power in the purchase and distribution of programming.

In addition, the Commission must consider the dynamic nature of the communications marketplace.⁵⁶ In this light, RCN urges the Commission to recognize that the richest, largest, and

⁵³ *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report and Order, CS Docket No. 97-248, RM No. 9097, FCC 98-189, *rel.* Aug. 10, 1998.

⁵⁴ *Id.*, at ¶¶ 10-21.

⁵⁵ *Id.*, at ¶¶ 34-46.

⁵⁶ *Id.*, § 533(f)(2)(E).

most powerful cable operators have increased their market dominance by investing in alternative MVPDs. Primestar, which has one of only three licenses for prime orbital locations for the delivery of direct broadcast services, is jointly owned by five large cable incumbents: TCI, Time Warner, Comcast, Cox and MediaOne, which collectively serve more than 60% of the nation's cable television subscribers.⁵⁷ These investments only serve to solidify the cable industry's grip on MVPD consumers, and as technology advancements lead to decreased costs of providing wireless video programming, their grip will only tighten. Accordingly, RCN urges the Commission to modify the numerator to reflect the cable industry's increased dominance as a result of these investments in alternative MVPDs.

However, the present status of the programming market, as well as the Commission's own actions, demonstrate that it is premature to include alternative MVPDs in the denominator of the ownership calculation for all segments of the market. This is especially true in respect to DBS since including virtually all television homes in the denominator would grossly distort the size of the MVPD market and would serve only to enhance opportunities for already dominant MSOs to further increase their market shares.⁵⁸

⁵⁷ Time Warner holds about 30% of the Primestar equity. Accordingly, it should be charged with at least that percentage of the homes attributed to Primestar in determining Time Warner's market dominance, or about 630,000 subscribers. When these data are added to Time Warner's existing cable subscribership of 12.6 million, Time Warner serves about 17% of the nation's 78 million MVPD subscribers. *Cable's Giants: Time Warner (and Ted) Finally Getting Their Due*, Electronic Media (May 4, 1998).

⁵⁸ The Justice Department's recent initiation of litigation to block the cable industry's ownership realignment in Primestar constitutes the Department's recognition that the MSOs are on the verge of unlawful conduct with respect to the DBS and MVPD markets. *U.S. v. Primestar*, No. 1-98CV01193 (D.D.C. May 12, 1998).

C. For Cable Operators Actual Subscribers Served Should Not Be Substituted For Homes Passed As The Measure of Market Dominance

The Further Notice also seeks comment on changing the basis of the horizontal ownership calculation from homes passed to subscribers served.⁵⁹ RCN agrees with the Commission's finding in the *Second Report and Order* that the homes passed standard most accurately reflects a cable operator's true market influence.⁶⁰ A home passed within a cable incumbent's franchise area is a potential subscriber that can be attached to the system quickly, easily and inexpensively. Indeed, the bulk of the cost of hooking up a new subscriber lies in the technician's visit, which typically is borne by the subscriber. Basing the market penetration measure on actual subscribers served would artificially reduce the perceived influence of cable operators. Though a cable operator may actually serve a relatively small percentage of the nation's homes, it is the number of homes passed by the operator that is the true measure of the operator's market influence. Additionally, shifting to actual subscribers is not necessary at this stage of the industry's development because there is no realistic prospect that any MVPD supplier other than traditional cable will pose any sort of potential issue of market dominance. It is therefore irrelevant to any immediate or even reasonably foreseeable market share concern that an entity like RCN may in the near future pass a great many more homes than it actually serves. Accordingly, RCN does not support the Commission's tentative suggestion that for cable operators basing the measure on actual subscribers is somehow more accurate.⁶¹

⁵⁹ Further Notice at ¶ 83.

⁶⁰ Second Report and Order at ¶ 24.

⁶¹ Further Notice at ¶ 86.

D. The Commission Should Foster Competition by Limiting Cable Clusters

RCN recommends that, in addition to the nationwide ownership limits, the Commission adopt new limitations on the extent to which incumbent cable operators can acquire a dominant position in a particular market or region by clustering franchise areas. It is common knowledge that "clustering" is one of the principle market-rationalizing considerations in cable managements' efforts to enhance market strength. RCN competes with Time Warner and Cablevision, the second and sixth largest MSO's in the country, in both the New York and Boston metropolitan markets. Cablevision has 2.61 million subscribers in the New York market and 345,000 subscribers in the Boston market.⁶² For its part, Time Warner boasts that it "owns and manages the world's most advanced, best-clustered cable systems, with 78% of its 12 million customers in systems of 100,000 subscribers or more,"⁶³ including 1,138,000 subscribers in New York and more than 235,000 subscribers in the Boston market.⁶⁴ Both of these markets were previously served by a larger number of cable operators. However, through swaps and other acquisitions, both markets have become dominated by only one or two cable companies. Clustering is the classic goal of cable management and no doubt vastly enhances Cablevision's and Time Warner's influence in the regional marketplace. For example, clustering enables cable

⁶² Another 308,000 of Cablevision's subscribers are in the Cleveland ADI, leaving only 103,000 in all other areas served by Cablevision. *See* Cablevision's Internet homepage: <http://www.cablevision.com/cvhome/cvabout/finance.htm>.

⁶³ *See* Time Warner Cable's home page: <http://www.pathfinder.com/corp/fbook/fbcable.html>. Time Warner Cable also notes that it has a total of 34 clusters each with more than 100,000 customers. *Id.*

⁶⁴ *Id.*

operators to deliver vertically-integrated video programming terrestrially, rather than via satellite. In this manner, cable operators can avoid the Commission's rules requiring competing MVPDs' access to such programming because the rules only apply to satellite-delivered programming.⁶⁵ The question the Commission must consider in light of the continuing dominance of the MVPD industry by cable franchisees and the continued unjustified increase in cable rates is whether such clustering should be allowed to proceed unhindered by regulatory constraints.

There are numerous ways in which management's inherent preference for highly clustered operations may be addressed. For example, the Commission might prohibit a cable operator from passing more than some percentage, such as 20%, of the total homes within any of the top 50 television markets. Such a limitation would require the largest cable companies to divest or trade portions of their multiple system operations presumably to smaller cable operators thereby reducing the dominance of the major cable companies in programming markets. An alternative approach might be to specify that no cable company could pass more than 10% of the homes within more than one of the top 10 markets or more than three of the top 25 markets. Both such limitations are offered only as suggested approaches; it is their result which is important. That is, the Commission should take meaningful steps to constrain the overwhelming influence of the largest companies in the biggest markets while also serving to diversify ownership somewhat in the smaller but still significant markets.⁶⁶

⁶⁵ See Ameritech Comments in CS Docket No. 98-102 at 34.

⁶⁶ RCN does not specifically address herein the impact of its proposals on by C.F.R. 4 76.503(b) which provides that cable companies can pass an additional five percentage points of the market if such additional cable systems are minority controlled. RCN strongly supports the goal of encouraging minority ownership in the cable industry both on its merits and as one way

IV. CONCLUSION

The overriding purpose of Section 613 of the Communications Act, as of Sections 651 through 653 governing open video systems, is to foster competition in the MVPD marketplace by constraining the ability of cable incumbents to dominant the marketplace, and the Commission must keep its regulatory eye on this goal. Doing so requires the imposition of further and more meaningful constraints on the franchised cable companies who are prepared to use their deep pockets and widespread public influence to take any step they believe will delay or impede the introduction of competition. In such a climate it is simply unthinkable that the horizontal ownership rules should be amended in any way which allows the franchised cable companies to expand their controlling grip on the MVPD market. Quite the contrary, the Commission must give serious consideration to the recommendations set forth herein, or others of similar ilk, which are designed to curb the cable industry dominance which exists today.

As RCN has discovered to its regret, making a meaningful entry into the MVPD industry is extremely difficult, time-consuming and expensive, due in large part to the pervasive anticompetitive campaigns and market dominance of the traditional cable companies. It is to alleviate this problem, not just for RCN but for the legion of other potential MVPD entrants, and

to encourage diversity and diffusion of ownership. In any of the alternative policy formulations set forth herein, therefore, RCN would anticipate that the principle represented in that provision would be incorporated, albeit on a proportional basis.

more importantly for the consuming public, that the Commission must take additional steps to curb the cable companies' dominance of the MVPD market.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lawrence A. Walke". The signature is fluid and cursive, with the first name "Lawrence" and last name "Walke" clearly distinguishable.

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August 14, 1998

EXHIBIT

Comparisons of Video Programming Rates Charged by RCN and Cable Incumbents

Hudson Rate Comparison

	<u>Cablevision</u>	<u>RCN</u>	<u>RCN+Phone</u>
<u>Basic service</u>	50 channels	80 channels	80 channels
Family Package	31.30	24.95	19.97
Converter	1.17	not required	not required
remote	0.19	not required	not required
expanded package/Disney	8.95	included	included
Total	41.61	24.95	19.97
Savings %		40%	52%